Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2012-008340-001 DT 07/27/2016

HON. ROSA MROZ

CLERK OF THE COURT
J. Matlack
Deputy

STATE OF ARIZONA

PATRICIA L STEVENS
MITCHELL S EISENBERG

v.

KURT DUSTIN COLEMAN (001)

RICHARD K MILLER
GREGORY J NAVAZO

CAPITAL CASE MANAGER

UNDER ADVISEMENT RULING

State's Motion in Limine #1 re: Proportionality Evidence or Argument

The Court has considered the State's Motion in Limine #1 re: Proportionality Evidence or Argument, the Defendant's Response, and the State's Reply. The Court does not need oral argument to decide this issue.

The State requests that the Court preclude "any argument or evidence pertaining to comparative proportionality analysis, as well as examples of other murders to suggest" that the murder is not the "worst of the worst." The Defendant argues that "defense counsel must be allowed to argue that the Defendant does not deserve death because he is not the worst of first degree murder Defendants."

The Court will not preclude the Defendant from carrying out his obligations to "protect his client and point out injustice when he sees it." However, in support of his claim, the Defendant cites two cases that were decided when our Supreme Court was obligated to perform independent proportionality review: *State v. Fierro*, 166 Ariz. 548, 804 P.2d 72 (1990) ("purpose of death penalty jurisprudence is to distinguish between the exceptional and the unexceptional

murder," written in context of court's obligation to conduct independent proportionality review); and *State v. Watson*, 129 Ariz. 60, 628 P.2d 943 (1981) ("death penalty is reserved for 'only the most aggravating of circumstances, circumstances that are so shocking or repugnant that the murder stands out above the norm of first degree murders, or the background of the Defendant sets him apart from the usual murderer.'" written during independent review).

Since *Fierro* and *Watson* were decided, the Arizona Supreme Court has held that a capital Defendant is not entitled to have the jury conduct a proportionality review. *State v. Johnson*, 212 Ariz. 425, 432, ¶¶19-20, 133 P.3d 735, 742 (2006) (noting that "consideration of other similarly situated Defendants is irrelevant to *this* Defendant's 'character or record,' and does not show any of the circumstances surrounding *this* Defendant's 'offense' that would call for a sentence less than death.").

IT IS ORDERED granting the State's Motion in Limine #1 RE: Proportionality Evidence or Argument.

State's Motion in Limine #2 re: Defendant's Natural Life Plea Offer

The Court has considered the State's Motion in Limine #2 re: Defendant's Natural Life Plea Offer, the Defendant's Response, and the State's Reply. The Court does not need oral argument to decide this issue.

The State requests that the Court (a) preclude witnesses from testifying about the Defendant's natural life plea offer and (b) modify the language to be read to the jury relating to the natural life plea offer. The Defendant objects to the modification of the language to be read to the jury.

(a) State's request to preclude witnesses from testifying about the Defendant's natural life plea offer

The Defendant did not address this part of the State's Motion in his Response. The Court does not know if the Defendant intends to have any witnesses testify about the Defendant's natural life plea offer. However, because the Defendant proposed that the jury be told during their mitigation presentation that the Defendant made a natural life offer, any additional witnesses talking about this natural life offer would be cumulative.

IT IS ORDERED granting the State's request to preclude lay witnesses from testifying about the Defendant's natural life plea offer. This order does not apply to the Defendant's allocution or expert witnesses who may use this factor in their opinions. This order also does not

preclude defense witnesses from testifying about the Defendant's acceptance of responsibility for the murder in other ways.

(b) State's request to modify the language to be read to the jury relating to the natural life plea offer

This Court previously ruled on March 25, 2016, that the jury would be permitted to consider the Defendant's pretrial offer to plead guilty in exchange for a natural life sentence as relevant mitigation evidence to demonstrate the Defendant's acceptance of responsibility for the murder, a non-statutory mitigating circumstance. *Busso-Estopellan v. Mroz/State*, 238 Ariz. 553, 364 P.3d 472, (2015). However, at the time of that ruling, the Court did not have the benefit of the State's input on the proposed language. The Court simply adopted the Defendant's language from the Defendant's Reply:

> On May 19, 2015, Mr. Coleman offered to plead guilty to the first degree murder of Ms. Price in exchange for a natural life sentence in which he would not be eligible for commutation, parole, work furlough, work release or release from confinement on any basis. The law does not require the state to extend a plea offer, and the state declined to extend a natural-life plea to Mr. Coleman.

The State now requests that the Court modify its instruction as follows:

> On May 19, 2015, Mr. Coleman, **through his attorneys**, offered to plead guilty to the first degree murder of Ms. Price **and receive a** ~~in exchange for~~ a natural life sentence in which he would not be eligible for commutation, parole, work furlough, work release or release from confinement on any bases **in exchange for the State not seeking the death penalty**. The law does not require the state to extend a plea offer. The state declined to ~~extend a natural life plea to Mr. Coleman~~ **accept Mr. Coleman's proposed plea offer**.

The Court finds that the plea offer was made by the Defendant himself, even though it was conveyed "through his attorneys". The Court declines to adopt that requested modification. The rest of the State's requested modifications are appropriate. Accordingly,

IT IS ORDERED that the following language will be read to the jury during the penalty phase, if there is one:

> On May 19, 2015, Mr. Coleman offered to plead guilty to the first degree murder of Ms. Price and receive a natural life sentence in which he would not be eligible for commutation, parole, work furlough, work release or release from

confinement on any bases in exchange for the State not seeking the death penalty. The law does not require the state to extend a plea offer. The State declined to accept Mr. Coleman's proposed plea offer.

State's Motion in Limine #8 re: Rebuttal to the Defendant's Natural Life Plea Offer

The Court has considered the State's Motion in Limine #8 re: Rebuttal to the Defendant's Natural Life Plea Offer, the Defendant's Response, and the State's Reply. The Court does not need oral argument to decide this issue.

In its March 25, 2016 Ruling, the Court stated:

> In its Response [to the *Defendant's Motion in limine: The Defendant's Offer to Plead to Natural Life*], the State indicated that if the Defendant is allowed to introduce evidence that he offered to plead guilty to first degree murder in exchange for a sentence of natural life, then the State requests that it be allowed to present rebuttal evidence as follows: …. The Defendant agrees that the State may properly introduce evidence that the State is not required to offer a plea and that the Defendant denied responsibility for this crime when interviewed by police. The Court also agrees that these are proper rebuttal evidence to whether the Defendant has accepted responsibility for his actions. Accordingly, the State may introduce those two items of evidence.
>
> As to the remaining items, the Court needs additional briefing because the argument as to why they are proper rebuttal evidence is not fully developed.
>
> IT IS ORDERED directing the State to file a motion to admit the requested rebuttal evidence, with citation to case law, if the State still intends to introduce those items of evidence during its rebuttal in the penalty phase.

The State now requests that the Court permit certain evidence in rebuttal to the Defendant's plea offer:

1) The State is not required to extend, or accept, a plea offer;
2) Defendant could have accepted responsibility at any time by pleading guilty to the Court;
3) Defendant denied any involvement in this crime when interviewed by police;
4) Defendant's convictions (cause number, date, nature, disposition);
5) Different prison conditions are associated with a natural life sentence versus a death row assignment;

6) Victims have a Constitutional right to confer with the prosecution about the disposition of a case;
7) Defendant denied responsibility for this murder during telephone conversations while incarcerated;
8) Defendant's statements during telephone conversations that a prison sentence of less than a life sentence was appropriate for this case; and
9) Defendant's statements about the proposed plea offer during telephone conversations while incarcerated.

Regarding mitigation rebuttal evidence, our Supreme Court has determined that:

> Under § 13–751(C), the state may present any information that is relevant to any of the mitigating circumstances, regardless of its admissibility under the rules of evidence. *See State v. Pandeli,* 215 Ariz. 514, 527 ¶ 42, 161 P.3d 557, 570 (2007). Deference is given to a trial court's decision as to the relevance of evidence presented during the penalty phase. *State v. McGill,* 213 Ariz. 147, 156–57 ¶ 40, 140 P.3d 930, 939–40 (2006). However, the Due Process Clause of the Fourteenth Amendment limits the scope of rebuttal to the extent that trial courts should not admit even relevant evidence that is "unfairly prejudicial." *Pandeli,* 215 Ariz. at 527–28 ¶ 43, 161 P.3d at 570–71 (quoting *Hampton,* 213 Ariz. at 180 ¶ 51, 140 P.3d at 963).

State v. Womble, 225 Ariz. 91, 102, ¶ 47, 235 P.3d 244, 255 (2010).

The Defendant argues that the "evidence should be precluded as it is inadmissible character evidence; cumulative in nature and is likely to confuse the jury in their deliberation, Ariz. R. Evid. 402 and 403."

"Admissibility of rebuttal evidence turn[s] on whether it [is] relevant to the existence of mitigation sufficiently substantial to call for leniency, A.R.S. § 13-752(G) and, if so, whether the evidence was unfairly prejudicial." *State v. Goudeau,* 239 Ariz. 421, 372 P.3d 945, 994 (2016). The State may present relevant evidence to rebut the defendant's "acceptance of responsibility" mitigator, to the extent that such evidence is not unfairly prejudicial.

The Court will address, as to each proposed Item of rebuttal, whether the State's proffered rebuttal is relevant to the "acceptance of responsibility" mitigator, and then will consider Rule 403, Ariz. R. Evid. Rule 403 permits the Court to exclude evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Items 1 and 3

The Court already ruled that the State may introduce evidence that the State is not required to extend, or accept, a plea offer, and that the Defendant denied responsibility when interviewed by the police.

Item 2

The State seeks to inform the jury that the Defendant could have accepted responsibility at any time by pleading guilty to the Court. The Defendant argues that the decision of whether the Defendant should plead guilty to the Court is one that involves the defense counsel's opinions and advice to the Defendant, and the defense team would have to explain their trial strategy to the jury.

THE COURT FINDS that evidence that the Defendant could have accepted responsibility at any time by pleading guilty to the Court is relevant. However, the relevance of this evidence is substantially outweighed by a danger of unfair prejudice and confusion of the issues between the Defendant's acceptance of responsibility and defense counsel's legal strategies.

IT IS ORDERED denying the State's request to admit this evidence.

Item 4

The State seeks to present all of Mr. Coleman's prior criminal convictions to include the date of their cause number, date of commission, their nature and their disposition in rebuttal. The Defendant argues that this is an end-run around Rule 609 which provides limits on using convictions after ten (10) years.

THE COURT FINDS that Evidence Rule 609 is not implicated because the issue is not about attacking the Defendant's character for truthfulness by evidence of his criminal convictions.

THE COURT FURTHER FINDS that evidence of the Defendant's prior criminal convictions are not relevant to whether the Defendant accepted responsibility for the murder by his offer to plead guilty. The State argues that the Defendant's criminal history is a consideration of whether to extend a plea. However, the issue is whether the Defendant accepted responsibility for the murder by his offer to plead guilty, not what the State's thought process is for accepting or rejecting the plea offer.

However,

THE COURT FURTHER FINDS that evidence of the Defendant's prior criminal convictions are relevant to rebut mitigation because it is evidence regarding any aspect of the Defendant's character, propensity, history or record. A.R.S. § 13-751(G). The Court further finds that the relevance of this evidence is not substantially outweighed by a danger of unfair prejudice.

IT IS ORDERED granting the State's request to admit this evidence.

Item 5

The State seeks to introduce evidence of the Defendant's living conditions associated with a natural life sentence versus a death row assignment. The Defendant argues that living conditions in prison are speculative.

THE COURT FINDS that the Defendant's future living conditions whether on death row or with a life sentence is minimally relevant. However, the Court also finds that the relevance of this evidence is substantially outweighed by a danger of unfair prejudice and confusion of the issues.

IT IS ORDERED denying the State's request to admit this evidence, unless the Defendant opens the door.[1]

Item 6

The State seeks to introduce evidence that the victims have a Constitutional right to confer with the prosecution about plea dispositions. The Defendant argues that this evidence is not relevant and that it will suggest to the jury that the victims favor death as the appropriate punishment, which is an opinion that is inadmissible, *citing State v. Carlson,* 237 Ariz. 381, 397, 351 P.3d 1079, 1095 (2015).

THE COURT FINDS that evidence about the victims' right to confer with the prosecution about plea dispositions are not relevant to whether the Defendant accepted responsibility for the murder by his offer to plead guilty. The issue is whether the Defendant accepted responsibility for the murder by his offer to plead guilty, not what the State's thought process is for accepting or rejecting the plea offer.

[1] There is an indication from a previous hearing that the defense will be calling an expert on prison living conditions. If the defense does call such an expert, then the evidence becomes more relevant and the Court will allow the State to rebut this evidence.

THE COURT FURTHER FINDS that even if the evidence is relevant, the evidence will suggest to the jury that the victims favor death as the appropriate punishment. The Court also finds that the relevance of this evidence is substantially outweighed by a danger of unfair prejudice and confusion of the issues.

IT IS ORDERED denying the State's request to admit this evidence.

Items 7, 8 and 9

The State seeks to introduce statements that the Defendant has made while incarcerated that he denied responsibility for the murder; that another sentence, less than a life sentence, is appropriate; and that he expressed reticence about entering the a plea for natural life.

The Court finds that the evidence may or may not be related to the Defendant's "acceptance of responsibility" mitigation. The Court will defer the ruling on these items until the State can provide the Court with transcripts of the exact statements the Defendant made. The defense will also be allowed to supplement his Response at that time.

State's Motion in Limine #3 re: Witness JD

The Court has considered the State's Motion in Limine #3 re: Witness JD, the Defendant's Response and the State's Reply. The Court does not require oral argument to decide this issue.

The State asks that the Court preclude "questions of JD about uncharged or dismissed offenses, or any misdemeanor offenses that occurred more than ten years ago", citing Evidence Rule 609. The Defendant claims that by entering into a testimonial agreement with JD, the State has made the offenses relevant. Neither side has specifically identified what uncharged or dismissed offenses, or misdemeanor offenses that occurred more than ten years ago to the Court, other than two examples cited in the Response and Reply.

Evidence Rule 609 identifies those convictions that may be used to attack a witness's character for truthfulness. By its terms, the Rule limits impeachment evidence to criminal convictions. Thus, evidence of uncharged or dismissed offenses is not admissible as it may affect JD's credibility as a witness. In its Reply, the State referenced a 2005 Pinal County case which was dismissed with prejudice years before the testimonial agreement. Evidence of this 2005 Pinal County case is not admissible under Evidence Rule 609, nor is it relevant under Evidence Rule 401.

Evidence Rule 609 allows the use of evidence of convictions to crimes that are "punishable by death or by imprisonment for more than one year", Evidence Rule 609(a)(1), and limits the use of evidence of convictions to crimes that are more than 10 years old, Evidence Rule 609(b). Thus, evidence of misdemeanor offenses that occurred more than ten years ago is also not admissible as it may affect JD's credibility as a witness.

IT IS ORDERED granting the State's Motion in Limine #3 re: Witness JD.

In his Response, the Defendant referenced that JD had a series of positive drug test results while he was on release for his 2012 burglary charge, and notes that the State "agreed not to rescind his testimonial agreement even though it considered such results to be criminal and therefore in breach of contract." The Defendant argues that the State's failure to file charges or declare the agreement null and void is a benefit to JD. Because these alleged positive drug test results are not criminal convictions, they do not fall under Evidence Rule 609, but they may be evidence of other crimes, wrongs or acts under Evidence Rule 404(b) to prove JD's bias and/or motive.

THE COURT FINDS that JD's alleged positive drug test results are relevant and that the probative value is not substantially outweighed by a danger of unfair prejudice.

IT IS ORDERED that JD's alleged positive drug test results are admissible under Evidence Rule 404(b).

The Court makes no rulings about other unspecified uncharged or dismissed offenses, or misdemeanor offenses that occurred more than ten years ago that could be considered under Evidence Rule 404(b). If the Defendant wants to admit any other uncharged or dismissed offenses, or misdemeanor offenses that occurred more than ten years ago under Evidence Rule 404(b), the Defendant shall file a motion to admit stating with specificity what those other acts are so that the Court can make an informed ruling.

In his Response, the Defendant points out that the State did not ask to preclude JD's felony convictions, and that if the State later requests preclusion of JD's felonies, the State should include an accounting for the amount of prison time included in the ten years. However, Evidence Rule 609(b)(2) states that it is the *proponent* of the use of criminal convictions older than 10 years that has to give the adverse party reasonable written notice of his intent to use the convictions so that the party has a fair opportunity to contest its use. In this case, the proponent is the Defendant. As there is no issue regarding JD's felony convictions currently pending before the Court, the Court will not decide that issue at this time. JD's felony convictions are not covered by this ruling.

State's Motion in Limine #4 re: Third-Party Defense

The Court has considered the State's Motion in Limine #4 re: Third-Party Defense, and the Defendant's Response. The Court does not need oral argument to decide this issue.

The State requests that the Court preclude the Defendant "from arguing a third-party defense, or alleging involvement of other participants in the crime without a basis for doing so." The Defendant identifies as the possible basis of the motion prior defense counsel's notice of David Matthews as having third party culpability. The Defendant agrees that "[to] the extent that the state seeks to preclude the allegations and argument that Matthews was involved, the motion should be granted."

In his Response, the Defendant also argues that "[i]f the state seeks a broader order, it should specify whom else it seeks to preclude as a third party suspect." As far as the Court is aware, the Defendant has not provided written notice to the State who else has third party culpability as required in Criminal Rule 15.2(b).

Accordingly,

IT IS ORDERED granting the State's Motion in Limine #4 re: Third-Party Defense. If the Court is in error regarding other individuals whom the defense has provided written notice to the State about third party culpability, then the State may file another motion in limine specifically addressing that individual.

State's Motion in Limine #5 re: Tiffany Wallin

The Court has considered the State's Motion in Limine #5 re: Tiffany Wallin, the Defendant's Response, the State's Reply, and the oral arguments made on July 22, 2016.

The State requests that the Court preclude any reference to statements made by Tiffany Wallin. The Defendant intends on calling defense investigator Bob Brunanski to describe the circumstances surrounding his interview of Tiffany Wallin and introducing through Brunanski the audio of his interview with Wallin, and the police report in which Wallin accused McKinley of raping her. The Defendant intends on using this evidence during the penalty phase of the trial only. The Defendant argues that this evidence is relevant as mitigation because they show that McKinley was involved in the murder and the State failed to prosecute McKinley. The State argues that there are reliability issues involving Wallin as she is heavily involved with drug use and has mental health issues. Furthermore, neither Wallin nor McKinley can be located.

THE COURT FINDS that evidence of McKinley's involvement and the State's failure to prosecute McKinley for his involvement is relevant mitigation.

THE COURT FURTHER FINDS that any reliability issues involving Wallin goes to the weight of the evidence and the State may address the reliability issues through cross-examination of Brunanski or through another witness in its rebuttal.

THE COURT FURTHER FINDS Wallin's statements about McKinley's involvement is admissible, and that the probative value is not substantially outweighed by a danger of unfair prejudice.

THE COURT FURTHER FINDS that the police report in which Wallin accused McKinley of raping her is not relevant. Even if it is relevant, the Court finds that the probative value is substantially outweighed by a danger of unfair prejudice and confusing the issues. The police report in which Wallin accused McKinley of raping her is not admissible.

IT IS ORDERED granting in part, and denying in part, the State's Motion in Limine #5 re: Tiffany Wallin.

The State requests that it be allowed to introduce McKinley's statements to the police regarding the murder and why McKinley has not been arrested to rebut Wallin's claim of McKinley's involvement and the State's failure to prosecute McKinley for his involvement,

THE COURT FINDS the State's request to be proper rebuttal, is relevant, and that the probative value is not substantially outweighed by a danger of unfair prejudice.

IT IS ORDERED that the State may introduce McKinley's statements to the police regarding the murder and why McKinley has not been arrested in rebuttal.

State's Motion in Limine #6 re: Residual Doubt

The Court has considered the State's Motion in Limine #6 re: Residual Doubt, the Defendant's Response, and the State's Reply. The Court does not need oral argument to decide this issue.

The State requests that the Court preclude evidence or argument of residual doubt during the Defendant's mitigation presentation. The State argues that certain unidentified evidence would constitute impermissible "residual doubt" testimony, such as was precluded in *State v. Harrod*, 218 Ariz. 268, 281, ¶¶ 45-46, 183 P.3d 519, 532 (2008) (polygraph results and assertions of innocence during allocution precluded).

The Court agrees with the State that evidence and argument of residual doubt are precluded. However, evidence that addresses the "circumstances of the offense" is permissible. *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S. Ct. 2954, 2964 (1978)(the sentence cannot be precluded from considering, *as a mitigating factor*, any aspect of a Defendant's character or record and any of the circumstances of the offense that the Defendant proffers as a basis for a sentence less than death.). Thus, a jury may not be precluded from considering any of the circumstances of the offense when determining whether "mitigating circumstances [are] sufficiently substantial to call for leniency." (A.R.S. §13-751(E). Permissible "circumstances of the offense" evidence is evidence of *how* a defendant committed the crime, while impermissible "residual doubt" evidence is evidence of *whether* a defendant committed the crime." *Oregon v. Guzek*, 546 U.S. 517, 526, 126 S. Ct. 1226, 1232 (2006).

IT IS ORDERED granting the State's Motion in Limine #6 re: Residual Doubt with the caveat that the Court will not preclude evidence of the "circumstances of the offense" at the penalty phase.

State's Motion in Limine #7 re: Execution Impact

The Court has considered the State's Motion in Limine #7 re: Execution Impact, the Defendant's Response, and the State's Reply. The Court does not need oral argument to decide this issue.

The State asks the Court to "preclude evidence or argument regarding the impact that the execution of the Defendant may have on the Defendant's family members and/or friends." The Arizona Supreme Court has held that the impact of an execution on a Defendant's family is not relevant to mitigation, because it is not related to the Defendant, the Defendant's character, or the circumstances of the offense. *State v. Rose*, 230 Ariz. 500, ¶64, 297 P.3d 906 (2013); *State v. Chappell*, 225 Ariz. 229, 236 P.3d 1176 (2010); *State v. Roque*, 213 Ariz. 193, 222, ¶119, 141 P.3d 368, 397 (2006)). In so holding, the Court noted that "[a]lthough similar evidence has been admitted in some cases, in none of those cases was the admissibility of the execution impact evidence at issue on appeal." *Rose*, 230 Ariz. at ¶65 (citing *Chappell*, 225 Ariz. at 238, ¶30 n.8).

This ruling does not preclude the Defendants' family, friends, associates or representatives from expressing support and/or mitigation. This ruling simply restricts anyone on behalf of the family from expressing views regarding the impact upon the family should the Defendant be executed. *See*, *Rose*, 230 Ariz. at ¶65 n.3 ("To the extent Rose argues that 'his family ties and the love of a Defendant's family [ ] has been held by this Court to be mitigation,' we agree that '[t]he existence of family ties is a mitigating factor.' *State v. Moore*, 222 Ariz. 1, 22 ¶ 134, 213 P.3d 150, 171 (2009).").

Based on the above,

IT IS ORDERED granting the State's Motion in Limine #7 re: Execution Impact.

Defendant's Motion to Permit Unsealed Filings

The Court has considered the Defendant's Motion to Permit Unsealed Filings, the State's Response, and the informant/witness' Notice of Joinder. The defense indicated that they would not file a Reply. The Court does not need oral argument to decide this issue. The Court agrees with the State's Response.

IT IS ORDERED denying the Defendant's Motion to Permit Unsealed Filings.

State's Notice re: Defendant's Jail Telephone Call Recordings

The Court has considered the State's Notice re: Defendant's Jail Telephone Call Recordings, the Defendant's Objection, the State's Response, and the Defendant's Reply. The Court does not need oral argument to decide this issue.

On May 26, 2016, the Court ordered the State to identify the recordings the State already knows it intends to use regardless of which phase of the trial. The State did so in its Notice filed on June 17, 2016, and indicated it will continue to seasonably supplement. The State also requested that the Defendant be ordered to provide notice of any calls that he intends to introduce and the legal basis for doing so. In his Response, the defense indicates that it will take several months to review the calls and that the defense is not ready to provide this notice. In his Reply, the Defendant indicates that he is not seeking any relief because the requested relief in the form of a continuance of the trial was already denied.

IT IS ORDERED overruling the Defendant's Objection. The State has complied with this Court's Order dated May 26, 2016.

IT IS FURTHER ORDERED that the Defendant identify the recordings that he already knows he intends to use regardless of which phase of the trial. Once the Defendant identifies which recordings he intends to use, the State may file any motions in limine it feels necessary.

Defendant's Motion to Preclude Gruesome Photographs

The Court has considered the Defendant's Motion to Preclude Gruesome Photographs, the State's Response, and the Defendant's Reply. The Court has also considered the photographs

at issue, the surveillance video of the murder, and the oral argument made at the hearing held July 22, 2016.

The Defendant objects to the admission of the following photographs: trial exhibits 28, 63, 65, and 66.[2] Exhibit 28 is a photograph of the deceased victim where she came to rest after being shot. The victim's hair partially covered her face and the bullet wound. The Court did not see any blood on the victim. Exhibit 63 is a close up of the victim's face already cleaned of blood with the Maricopa County Medical Examiner placard. Exhibit 65 consists of two photographs. The first photograph is a close up of the victim's face showing the bullet wound and two tracks of dried blood coming from the bullet wound down her face. The second photograph is the close-up of the bullet wound itself. According to the State, the first photograph is to give context to where the bullet wound is. The second photograph shows that the gun shot was a contact shot. Exhibit 66 is a close-up photograph of the victim's forehead/eyes portion of the face showing the bullet wound. According to the State, exhibits 63, 65 and 66 are autopsy photos which will be used by Dr. Keen, the medical examiner, during his testimony. The Defendant indicates that the defense will not be contesting the cause and manner of death.

When assessing the admissibility of photographs, the court must consider "the photographs' relevance, the likelihood that the photographs will incite the jurors' passions, and the photographs' probative value compared to their prejudicial impact." *State v. Davolt*, 207 Ariz. 191, 208, ¶ 60, 84 P.3d 456, 473 (2004)). "There is nothing sanitary about murder," and nothing "requires a trial judge to make it so." *State v. Rienhardt*, 190 Ariz. 579, 584, 951 P.2d 454, 459 (1997). Photographs, however, cannot be introduced "for the sole purpose of inflaming the jury." *State v. Gerlaugh*, 134 Ariz. 164, 169, 654 P.2d 800, 805 (1982). Autopsy photographs are admissible to "show the nature and location of the fatal injury, to help determine the degree or atrociousness of the crime, to corroborate state witnesses, to illustrate or explain testimony, and to corroborate the state's theory of how and why the homicide was committed." *State v. Chapple*, 135 Ariz. 281, 288, 660 P.2d 1208, 1215 (1983). "Even if a defendant does not contest certain issues, photographs are still admissible if relevant because the burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense." *State v. Dickens*, 187 Ariz. 1, 18, 926 P.2d 468, 485 (1996). However, if a defendant does not contest any "fact that is of consequence," Ariz. R. Evid. 401, then a relevant exhibit's probative value may be minimal. Under such circumstances, gruesome photographs may "have little use or purpose except to inflame," *Chapple*, 135 Ariz. at 288, 660 P.2d at 1215.

[2] Collectively Exhibit 2 to the July 22, 2016 hearing. There is an additional photograph contained within Exhibit 2 labeled "12-3748-945". At this time, the State does not intend to introduce this exhibit at trial. Therefore, the Court is not making any rulings regarding this photograph at this time.

THE COURT FINDS that exhibit 28 is relevant to show where the victim's body was found.

THE COURT FURTHER FINDS that exhibits 63, 65 and 66 are also relevant to show the fact and cause of death, and to assist and corroborate the medical examiner's explanation of the victim's injuries.

THE COURT FURTHER FINDS that the probative value of these photographs is not substantially outweighed by a danger of unfair prejudice. The Court does not find the photographs to be gruesome.

The Court has viewed the surveillance video of the murder. The Court does not find that the video shows the same things that these photographs show. The Court does not find the video footage to be cumulative of trial exhibits 28, 63, 65, and 66.

IT IS ORDERED denying the Defendant's Motion to Preclude Gruesome Photographs.

Defendant's Motion to Preclude Religion

The Court has considered the Defendant's Motion to Preclude Religion, the State's Response, and Defendant's Reply, and Exhibit A (under seal). The Court has further considered the photographs at issue, and oral argument made at the hearing held July 22, 2016.

The Defendant objects to any photographs showing the victim wearing a cross necklace around her neck when she is alive and deceased, arguing that the showing of the cross necklace will highlight the victim's religious beliefs. The State indicates that the victim always wore a cross necklace. At the guilt phase, the State intends to introduce trial exhibit 62 which is a photograph showing the victim while she was alive, and trial exhibit 64 which are two X-ray photographs of the victim's head which also show the cross necklace.

THE COURT FINDS that the cross necklace depicted in trial exhibits 62 and 64 is not relevant to the issues involved in the guilt phase.

The Court notes that the photographs can easily be redacted to remove the cross without impacting the relevance of the photographs.

IT IS ORDERED granting the Defendant's Motion to Preclude Religion in the guilt phase. The Court directs the State to redact the cross from trial exhibits 62 and 64. If the State does not have the ability to do so, the State shall notify the defense so that the defense can perform the task.

During oral argument, the State informed the Court that the victim's family is likely to show photographs of the victim in which the victim is wearing the cross necklace since the victim always wears the cross necklace.

THE COURT FINDS that photographs of the victim wearing the cross necklace are relevant in the penalty phase because wearing the cross is part of the victim's characteristics and the photographs may be shown as part of the impact of the murder on the victim's family. *See United States v. Mitchell*, 502 F.3d 931, 989-90 (9th Cir. 2007). Admission of evidence regarding the victim's characteristics and the impact of the murder on the victim's family will only be deemed unconstitutional if it is so unduly prejudicial that it renders the sentence fundamentally unfair. *Id.* The Court finds that merely showing photographs of the victim wearing the cross necklace will not unduly prejudice the Defendant.

To alleviate any potential prejudicial effect, the Court will instruct the jury that they cannot consider religious beliefs of the defendant or of the victim in making their decision.

IT IS ORDERED denying the Defendant's Motion to Preclude Religion in the penalty phase.

State's Motion to Admit Evidence under Rule 404(b)

The Court has considered the State's Motion to Admit Evidence under Rule 404(b), the Defendant's Response, the State's Reply. The Court has also considered the evidence presented and the arguments of counsel at the hearing held on July 22, 2016.

The State requests that the Court allow it to present certain evidence under Evidence Rule 404(b):

1. When arrested in August 2012, the Defendant told police that he had failed to appear for sentencing on another matter in March 2012, a warrant had been issued for him at that time and he had been in hiding since the issuance of the warrant.
2. Defendant had been involved in mailbox thefts in December 2011- January 2012 and had implicated others when caught.
3. Defendant had run to Belize to avoid law enforcement in the past and needed $5000 to go back to Belize.
4. Defendant was in possession of multiple ID's when arrested for the murder, including an Arizona driver's license that had his picture with a different name.
5. Defendant had purchased a handgun a couple of months prior to the murder.
6. Defendant had drilled out the barrel of a handgun after the murder had taken place.

The State claims that other conduct by this defendant is admissible under 404(b) and also to show consciousness of guilt. The Defendant objects.

The State alleges that on June 17, 2012, the Defendant murdered the victim who was working at a cigarette store. The Defendant was arrested for the murder on August 4, 2012.

As to items 1 and 3,

THE COURT FINDS that the evidence is relevant to establish the Defendant's motive to rob the victim.

As to items 1, 2, and 3:

THE COURT FINDS that the evidence is not relevant to establish the Defendant's consciousness of guilt.

As to item 4,

THE COURT FINDS that the evidence that the Defendant was in possession of multiple IDs, including an Arizona driver's license that had his picture with a different name is relevant to establish the Defendant's consciousness of guilt, or plans to flee the jurisdiction. However, the Court notes that a month and a half after the murder, the Defendant was arrested and still had not fled the jurisdiction.

Our appellate court has held that admissibility of an alias must be "weighed in consideration of its real significance in relation to the trial as a whole." *State v. Stanhope*, 139 Ariz. 88, 93-94, 676 P.2d 1146, 1151-52 (App. 1984) citing *Petrilli v. United States,* 129 F.2d 101 (8th Cir.1942) *U.S. cert. denied*, 317 U.S. 657, 63 S.Ct. 55 (1942). "Because evidence of an alias can be prejudicial, it should not be admitted where it serves no useful purpose." *State v. Hanson*, 138 Ariz. 296, 301, 674 P.2d 850, 855 (App. 1983) citing *State v. Randall*, 8 Ariz.App. 72, 443 P.2d 434 (1968).

As to items 1, 2, 3 and 4,

THE COURT FINDS that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. The jury would learn of unrelated criminal activity, of the Defendant's warrant status in an unrelated case, of the State's conclusion that the Defendant intended to flee based on his past behavior, and of the Defendant's character to avoid responsibility for his alleged actions by seeking to implicate others.

IT IS ORDERED denying the State's request to admit items 1, 2, 3 and 4 as other acts evidence.

As to items 5 and 6 related to the handgun,

THE COURT FINDS that the acts of purchasing of the handgun and the drilling out of the gun barrel are intrinsic evidence and therefore not subject to the 404(b) analysis. *State v. Ferrero*, 228 Ariz. 239, 274 P.3d 509 (2012)(Evidence Rule 404(b) only applies to other acts evidence that is extrinsic, and does not apply to intrinsic evidence which is evidence that directly proves the charged act or is performed contemporaneously with and directly facilitates the commission of the charged act).

THE COURT FINDS the handgun evidence to be relevant. The victim was murdered by a .25 caliber weapon. There is evidence to suggest that the Defendant purchased a .25 caliber semi-automatic gun just a few months before the murder. When the Defendant was arrested, the police found a .25 caliber semi-automatic gun with its gun barrel drilled out in his duffle bag. The forensic analyst concluded that the fired cartridge case has class characteristics consistent with the gun with its barrel drilled out. There is evidence to suggest that the gun purchased by the Defendant is the same gun used to murder the victim, and that the gun found by the police is the murder weapon.

THE COURT FURTHER FINDS that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

IT IS ORDERED granting the State's Motion to Admit Evidence under Rule 404(b) on items 5 and 6, related to the handgun.

Defendant's Motion to Strike Allegation of 13-751(F)(2)

The Court has considered the Defendant's Motion to Strike Allegation of 13-751(F)(2), the State's Response and the Defendant's Reply. The Court does not need oral argument to decide this issue.

The Defendant argues that using the armed robbery to elevate the offense to felony murder and as an aggravating circumstance fails to serve the narrowing function required by the Eighth Amendment. The Arizona Supreme Court has already rejected this argument in *State v. Forde*, 233 Ariz. 543, ¶¶105-108, 315 P.3d 1200 (2014)(The (F)(2) aggravator does not violate the Eighth Amendment because it appropriately channels and limits the sentencer's discretion by explicitly identifying which offenses qualify as "serious offenses".).

The Defendant next argues that the use of armed robbery as both the predicate felony for first degree murder and an aggravating circumstance violates the Defendant's right against double jeopardy. The Double Jeopardy Clause bars multiple prosecutions and multiple punishments for the same offense. The Defendant has not been charged with the same offense in any count of the Indictment and is not being subjected to multiple prosecutions. If convicted of both felony murder and armed robbery, he also will not be subjected to multiple punishments. As long as they do not result in multiple punishments, the charges alone do not violate double jeopardy. *Merlina v. Jejna*, 208 Ariz. 1, 4, ¶14, 90 P.3d 202 (App. 2004). The Arizona Supreme Court also reaffirmed its holding that consecutive punishments for felony murder and the predicate felony for that felony murder do not violate the Double Jeopardy Clause. *State v. Martinez*, 218 Ariz. 421, 439, ¶81, 189 P.3d 348, 366 (2008) (citing *State v. Girdler*, 138 Ariz. 482, 489, 675 P.2d 1301, 1308 (1983)). As the Court of Appeals noted in *State v. Siddle*, 202 Ariz. 512, 517, ¶15, 47 P.3d 1150, 1155 (App. 2002), "[f]elony murder and the predicate felony are distinct crimes and may be punished separately in a single trial without running afoul of double jeopardy principles.

Finally, in its recent decision in *Goudeau,* the Arizona Supreme Court rejected similar Eighth Amendment and Double Jeopardy claims. *State v. Goudeau,* 239 Ariz. 421, 372 P.3d 945, 994 (2016).

IT IS ORDERED denying the Defendant's Motion to Strike Allegation of 13-751(F)(2).

Motion to Dismiss Death Notice: Capital Statutory Scheme Unconstitutional

The Court has considered the Defendant's Motion to Dismiss Death Notice: Capital Statutory Scheme Unconstitutional, the State's Response and the Defendant's Reply. The Court does not need oral argument to decide this issue.

The Defendant requests that the Court dismiss the Notice of Intent to Seek the Death Penalty based on various claims. The Defendant acknowledges that the claims raised in his ~~in~~ motion have been rejected by the Arizona Supreme Court in other cases, and that claim number five was rejected by the Maricopa County Superior Court in this case ("Minute Entry" Judge Joseph Kreamer, June 18, 2015). Nonetheless, the Defendant alleges that "each claim is meritorious and requires the court to strike the state's notice seeking death."

As to Claims 1-4 and 6, the Court finds that it is obligated to follow the decisions of the Arizona Supreme Court. *See Sell v. Gama*, 231 Ariz. 323, 330, 295 P.3d 421, 428 (2013) ("The lower courts are bound by our decisions, and this Court alone is responsible for modifying that precedent.").

As to Claim 5, the defendant acknowledges that this Court ruled adversely to his position in the instant case by Ruling dated 6/18/2015. That ruling is the law of the case. The Court declines defendant's invitation to revisit the Court's previous ruling. The Court finds that it will follow the law of the case.

IT IS ORDERED denying the Defendant's Motion to Dismiss Death Notice: Capital Statutory Scheme Unconstitutional.

Motion to Dismiss the Death Penalty: Unavailable Mitigation Records

The Court has considered the Defendant's Motion to Dismiss Death Penalty: Unavailable Mitigation Records, the State's Response and the Defendant's Reply. The Court does not need oral argument to decide this issue.

The Defendant requests that the Court dismiss the death penalty based on his inability to secure certain mitigation evidence. The evidence includes records related to his childhood and early and middle teen years,[3] when "he was institutionalized, incarcerated, tested, and evaluated by private and public institutions in this state for a variety of emotional, psychological and behavioral ailments. Mr. Coleman's capital defense team has been pursuing historical records for the better part of two years. Some records still exist and have been collected and disclosed to the prosecution. Many essential records, however, have been destroyed." The facilities and agencies that have destroyed allegedly vital records pertaining to the Defendant are described in the motion.

The State identifies the records that the Defendant is unable to locate as those from, *inter alia*, "Maricopa County Medical Center, Tri City Mental Health Center, Arizona Boys Ranch and the Adobe Mountain Correctional Facility. What the Defendant fails to mention is [*sic*] the thousands of pages of documentation provided to him from the Mesa Public School District, Phoenix Children's Hospital Bio-Behavioral Unit, juvenile and adult court and DOC records, as well as additional notes and records from physicians and staff of institutions such as Good Samaritan Institute of Behavior Medicine."

In capital cases, "the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)

[3] Defendant was born in 1973, at the time of the alleged murder (2012) was 39, and at the time of trial (2016) will be 43 years old.

(plurality opinion). "What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Zant v. Stephens*, 462 U.S. 862, 879 (1983) (emphasis in original). The requirement of an individualized determination is met when the sentencer is able to consider relevant mitigating evidence of the defendant's record and character and the circumstances of the crime. *Tuilaepa v. California*, 512 U.S. 967, 972 (1994).

If mitigation exists, but Defendant cannot find or present it because of circumstances beyond his control, he may not receive the individualized consideration at sentencing that due process requires. In *State v. Bocharski*, 200 Ariz. 50 (2001), the Arizona Supreme Court remanded for resentencing because funding problems interfered with the mitigation investigation, thus interfering "with the fair and orderly administration of justice." *Id.* at 62, ¶ 62. The Court noted that mitigation that "may have made a difference in sentencing" probably existed. *Id.* at ¶ 60. Unlike *Bocharski*, in the instant case, the investigation has disclosed background material that may be mitigating and may be incorporated into the mitigation presentation, irrespective of the availability of certain documentation.

The Defendant did not provide the Court with an outline of records and information and witnesses that have been successfully secured. The Court relies on the State's representation that, notwithstanding the destruction of certain records, the Defendant has been able to conduct a mitigation investigation that will yield enough information to provide Defendant with the individualized consideration he is entitled to at sentencing. Defense counsel may have obtained information from Defendant's family, other individuals, entities and experts. Moreover, defense counsel will certainly be able to present information regarding the general background of the defendant, evidenced by the records he was able to secure, and the difficulties encountered by him during his early years.

The Court finds that the defense team appears to have made significant efforts to gather mitigation. Defense counsel has outlined records that they are unable to secure, related to the Defendant's childhood and teen years, a time span that ended when the defendant turned 20, over 23 years ago.

IT IS ORDERED denying the Defendant's Motion to Dismiss the Death Penalty: Unavailable Mitigation Records.

Motion to Allow Defendant's Mother to Attend Trial

The Court has considered the Defendant's Motion to Allow Defendant's Mother to Attend Trial, the State's Response and the Defendant's Reply. The Court does not need oral argument to decide this issue.

Anticipating that the parties will invoke the rule of exclusion, the Defendant requests that the Court make an exception and permit Dolly Coleman, the Defendant's mother, to be present throughout her son's trial. According to the Defendant, Mrs. Coleman will not be a witness during either the guilt or aggravation phases of the trial, but will be called as the defense's first witness during the penalty phase. Her testimony will cover family history and her son's difficulties.

Our Supreme Court has held that the rule of exclusion applies to the aggravation and penalty phases of the trial.

> Patterson contends that the trial court abused its discretion by excluding defense mitigation witnesses from the courtroom during the aggravation phase of trial. A trial court must, at the request of a party, "exclude prospective witnesses from the courtroom during opening statements and the testimony of other witnesses." Ariz. R.Crim. P. 9.3(a). This rule applies during the aggravation and penalty phases, and the trial court did not err in granting the State's motion to exclude prospective witnesses under Rule 9.3. *See id.* cmt. ("Section (a) extends the language of the 1956 Arizona Rules of Criminal Procedure ... to all proceedings.")

State v. Patterson, 230 Ariz. 270, 277, 283 P.3d 1, 8 (2012) *cert. denied*, 133 S. Ct. 987 (U.S. 2013).

The Defendant argues that it should be within the Court's discretion because (1) the federal rule permits consideration of various factors, citing a 2nd Circuit decision and (2) the Court has discretion as to whether to impose sanctions for violating an exclusionary order.

The 2nd Circuit was actually addressing the district judge's exemption of more than one witness under a particular subprovision of Rule 615 and emphasized that witnesses may only be excepted from "sequestration" pursuant to a stated "exemption":

> Because a court may only decline to grant a party's request to sequester particular witnesses under one of the Rule 615 exemptions, the rule carries a strong presumption in favor of sequestration. The party opposing sequestration therefore has the burden of demonstrating why the pertinent Rule 615 exception applies, *Edinborough*, 625 F.2d at 474, and "why the policy of the Rule in favor of automatic sequestration is inapplicable in that situation," *id.* at 476. The party requesting sequestration should thereafter have a chance to demonstrate its necessity. *Id.* Such an exchange affords the court full opportunity to consider the competing interests and, if it denies the motion, to explain the factors it considered in reaching its decision. *Id.*

United States v. Jackson, 60 F.3d 128, 135 (2d Cir. 1995).

The Court finds that the language of the rule, "the court must order witnesses excluded,' is mandatory. As the defendant agrees, Arizona's Rule 615 tracks its federal counterpart. A Committee Note to the federal rule addresses the issue of the Court's discretion, advising that exclusion is a matter of right (unless an exception applies):

> ADVISORY COMMITTEE NOTES
> 1972 Proposed Rules
> The efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion. 6 Wigmore §§ 1837-1838. The authority of the judge is admitted, the only question being whether the matter is committed to his discretion or one of right. The rule takes the latter position. No time is specified for making the request.

Fed. R. Evid. 615.

The rule of exclusion will be in effect until after the witness' testimony is completed. Upon completion of testimony by the witness, the rule will lift as to that witness.

Defendant claims that imposing the rule of exclusion at the guilt phase will diminish his mitigation evidence, the mitigating factor of family support, and would be prejudicial. The jury would infer that Mrs. Coleman does not support her son. To alleviate any prejudice, the Court will be instructing the jury in the preliminary jury instructions regarding the mandate of the exclusionary rule as follows:

> The Rule of Exclusion of Witnesses is in effect and will be observed by all witnesses until the trial is over and a result announced. This means that all witnesses will remain outside the courtroom during the entire trial except when one is called to the witness stand. They will wait in the areas directed by the bailiff unless other arrangements have been made with the attorney who has called them. The rule also forbids witnesses from telling anyone but the lawyers what they will testify about or what they have testified to. If witnesses do talk to the lawyers about their testimony, other witnesses and jurors should avoid being present or overhearing.
>
> The lawyers are directed to inform all their witnesses of these rules and to remind them of their obligations from time to time, as may be necessary. The parties and their lawyers should keep a careful lookout to prevent any potential witness from remaining in the courtroom if they accidentally enter.

The only exception to this rule is that each side will be allowed to designate one investigator to sit through the trial. The victim's family is also allowed to sit through the trial even though they may testify at trial.

IT IS ORDERED denying the Defendant's Motion to Allow Defendant's Mother to Attend Trial.

Motion to Compel Victim Impact Statements

The Court has considered the Defendant's Motion to Compel Victim Impact Statements, the State's Response and the Defendant's Reply. The Court does not need oral argument to decide this issue.

The Defendant requests that the Court order the disclosure of victim impact evidence in advance of its presentation. The Defendant argues that defense counsel should be allowed to object to victim impact evidence in advance of trial to assure that improper victim impact evidence is not considered by the jury.

There is no support in Arizona law to grant Defendant's request to allow the Defendant, or defense counsel, to preview a victim impact statement in advance of the penalty phase of trial. A.R.S. §13-4426.01 specifically provides that "a victim's statement is not subject to disclosure to the state or the defendant or submission to the court." Further, the victim's right to be heard is not exercised as a witness, and he or she is not subject to cross-examination. *Id*.; s*ee, State v. Foreman (Phillips),* 211 Ariz. 153, 118 P.3d 1117 (App. 2005), *review denied* (trial court erred in finding A.R.S. §13-4426.01 unconstitutional). However, "the state and the defense are afforded the opportunity to explain, support or deny the victim's statement." *Id.*

When making an impact statement to the jury, a victim may not make a sentencing recommendation. *Lynn v. Reinstein,* 205 Ariz. 186, 68 P.3d 412 (2003). In addition to the clear-cut prohibition against making any sentencing recommendation, the Constitution places a second limit on victim impact statements: a statement violates due process if it is "so unduly prejudicial that it renders the trial fundamentally unfair." *Payne v. Tennessee,* 501 U.S. 808, 825 (1991). Consequently, our Supreme Court has directed "prosecutors and victims not to venture too close to the line, lest they risk a mistrial. And, recognizing the confines of A.R.S. § 13–4426.01 but also a defendant's constitutional rights, we encourage judges, in their sound discretion, to screen and, if necessary, limit an orchestrated, overly dramatic VIE presentation 'that is so unduly prejudicial that it renders the trial fundamentally unfair.' *Payne,* 501 U.S. at 825." *State v. Rose,* 230 Ariz. 500, ¶47, 297 P.3d 906 (2013).

THE COURT FINDS that the Defendant has no right to preview the victim impact statement in advance of its presentation.

IT IS ORDERED denying the Defendant's Motion to Compel Victim Impact Statements.

IT IS FURTHER ORDERED that the prosecution shall inform the victims of the limits of victim impact statements before the victims give the statements. The Court encourages the prosecution to request that the victims allow the prosecution to screen the victim impact statements to make sure that they will not cause a mistrial. The Court will also advise the victims prior to them giving the victim impact statement of the limits imposed by our appellate courts.

Motion for a Victim *Donald* Hearing

The Court has considered the Defendant's Motion for a Victim *Donald* Hearing, the State's Response and the Defendant's Reply. The Court does not need oral argument to decide this issue.

The Defendant requests that the Court ask the State to confirm that it has conferred with the victim's family about the natural life proposal, and that it has informed the victim's family of their right to attend proceedings in which plea negotiations are discussed.

The Defendant cites *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000), in support of his request to have the Court hold a hearing to confirm that the State fulfilled its statutory obligations to inform the victim's family regarding the plea proposal and of their right to attend the settlement conference. *See* A.R.S. §§13-4423(A); 13-4419(A). The *Donald* court held that a claim for ineffective assistance of counsel may be predicated upon the failure of defense counsel to adequately explain the terms of a favorable plea agreement proposed by the State. After that decision, courts began holding *Donald* hearings prior to the expiration of plea offers at the request of counsel to confirm that the defendant was making an informed decision to reject a plea before proceeding to trial.

The Court finds no equivalent between a defendant's right to make an informed decision to accept or reject a plea agreements before exercising his right to proceed to trial and the victim's right to confer with the prosecutor about various matters, including plea discussions as the victim has neither a right to accept or reject an offer nor a right to proceed to trial.

In any case, in its Response, the State has avowed that it has conferred with the victim's family about the Defendant's requested plea offer at the time the plea offer was under consideration.

IT IS ORDERED denying the Defendant's Motion for a Victim *Donald* Hearing.

Defendant's Motion to Compel Confirmation of Victim Status

The Court has considered the Defendant's Motion to Compel Confirmation of Victim Status, the State's Response and the Defendant's Reply. The Court does not need oral argument to decide this issue.

The Defendant requests that the Court order the State to confirm that the witnesses it claims are victims qualify as victims under the law. The State confirms that the victims are Ms. Price's daughter and son. The State also informs the Court that Ms. Price's fiancé, Ken Beaumont, may also testify during the guilt phase and penalty phase, and would like to make a victim impact statement. The State acknowledges that Mr. Beaumont does not qualify for victim status under the law.

THE COURT FINDS that Ms. Price's daughter and son qualify for victim status under the law.

THE COURT FINDS that Mr. Beaumont does not qualify for victim status under the law. However, Mr. Beaumont may be called as a witness in guilt phase if he has relevant testimony. He may also be called as a sworn witness subject to cross-examination in the penalty phase regarding the impact of Ms. Price's murder on him. *See State v. Leteve*, 237 Ariz. 516, ¶¶ 47-52, 354 P.3d 393, 405-07 (2015) (person who are immediately and closely connected to the victim, such as neighbors may testify about the impact of the murder upon the State showing that it is necessary to inform the jury of the harm resulting from the crime and as long as the State has not already introduced extensive victim impact evidence). The defense may still object to Mr. Beaumont's testimony at the time of the penalty phase after hearing what other victim impact evidence has been presented.

IT IS ORDERED denying the Defendant's Motion to Compel Confirmation as moot.

Defendant's Motion to Compel the Identification of Experts

The Court has considered the Defendant's Motion to Compel Motion to Compel the Identification of Experts, the State's Response and the Defendant's Reply. The Court does not need oral argument to decide this issue.

The Defendant requests that the State identify their expert witnesses as required by Criminal Rule 15.1. The State indicates that it has previously provided this information to the

defense. The defense does not dispute that the State has provided the information but asserts that the State should formally file a Supplemental Notice of Disclosure.

IT IS ORDERED denying the Defendant's Motion to Compel Motion to Compel the Identification of Experts as moot. However, the State is directed to file a formal supplemental notice of disclosure of the experts, specifically noting when the information was provided, for the purposes of the appellate record.

Defendant's Motion to Compel Impeachment Evidence

The Court has considered the Defendant's Motion to Compel Impeachment Evidence, the State's Response and the Defendant's Reply. The Court does not need oral argument to decide this issue.

The Defendant requests that the State produce impeachment evidence that it intends to use against the defense experts, including transcripts of testimony in other trials and reports written by the experts in other cases, claiming a substantial need for and undue hardship in obtaining these materials. The State argues that it does not know what impeachment materials may be relevant because disclosure is not complete and it has not interviewed the defense experts yet.

The Court agrees that the goal is disclosure is "the preparation of cases for trial or settlement" rather than "hide the pea." *Wells v. Fell*, 231 Ariz. 525, 528-29, 297 P.3d 931 (App. 2013). The Court finds that given the status of this case, with a fast approaching trial date, that the defense has a substantial need for the transcripts and reports requested and that there is an undue hardship for obtaining these materials.

IT IS ORDERED granting the Defendant's Motion to Compel Impeachment Evidence.

However, since the State does not know what impeachment materials may be relevant until disclosure is completed and the State has interviewed the defense experts,

IT IS ORDERED that the State shall provide the transcripts and reports of defense experts that the State intends to use to impeach the defense experts **within 15 days after disclosure is completed and the State has interviewed the defense experts**. This order does not require the State to cite page and line numbers or highlight the portions of the reports it intends to use. *See State v. Wallen,* 114 Ariz. 355, 361, 560 P.2d 1262, 1268 (App.1977) ("The criminal discovery rules do not require the state to provide a word-by-word preview to defense counsel of the testimony of the state's witnesses.").

Defendant's Motion the Identification of Cell Phone Calls

The Court has considered the Defendant's Motion the Identification of Cell Phone Calls, the State's Response and the Defendant's Reply. The Court does not need oral argument to decide this issue.

The Defendant requests that the State identify exactly which cell phone entries it intends to use from the cell phone provider documents it has disclosed, the name of the witness who will testify concerning the entry, and the relevancy of each entry, citing Criminal Rule 15.1(b). In its Response, the State has identified generally what it intends to use of the cell phone entries and who it expects will testify regarding the cell phone information.

THE COURT FINDS that the State has met its obligations under Criminal Rule 15.1. The Court is not aware of any case law, rules or statutes that require the State to identify exactly what it will use, who will testify as to each entry to be used, or to identify the relevancy of the entry intended to be used as the defense has requested. *See State v. Wallen,* 114 Ariz. 355, 361, 560 P.2d 1262, 1268 (App.1977) ("The criminal discovery rules do not require the state to provide a word-by-word preview to defense counsel of the testimony of the state's witnesses."). *See also State v. Williams,* 183 Ariz. 368, 379, 904 P.2d 437, 448 (1995)(Criminal discovery rules does not require the State to explain how it intends to use each of its witnesses).

IT IS ORDERED denying the Defendant's Motion the Identification of Cell Phone Calls. If the Defendant has any concerns about any of the cell phone entries generally identified by the State, the Defendant may inquire of the State its intention to use any specific entry, photograph or video, and if the Defendant is still concerned, the Defendant may file a motion in limine regarding that specific entry, photograph or video. Alternatively, the Defendant may object at the time of the trial.

Defendant's Motion for Discovery Relating to Disclosed State's Witnesses

The Court has considered the Defendant's Motion for Discovery Relating to Disclosed State's Witnesses, the State's Response and the Defendant's Reply. The Court does not need oral argument to decide this issue.

The Defendant requests that the State produce for all witnesses: (1) the biographical information including dates of birth; (2) the relevance/subject matter for each witness; and (3) the notes, emails, texts and/or recordings of statements whether to attorneys, support staff, paralegals, investigators, or other personnel at the Maricopa County Attorney's Office or the Mesa Police Department. In its Response, the State asserts that it has complied with all disclosure requirements under Criminal Rule 15.1. There does not appear to be a dispute about

the State's disclosure for categories 1 and 2. As to the third category regarding the notes, emails, texts and/or recordings of statements of witnesses, the State asserts that it only has to disclose all *relevant* written or recorded statements of all listed witnesses which it has already done. The Court agrees with the defense. This is the same type of motion that the State filed on February 22, 2016, requesting that the Court order the defense to provide the same type of information.

Criminal Rule 15.1(b)(1) only requires the State to disclose the *relevant* written or recorded statements of all persons and experts whom the prosecutor intends to call as witnesses in the case-in-chief, while Rule 15.1(i)(3)(a) and (b) and Rule 15.1(i)(5)(a) and (b) requires the State to disclose *any* written or recorded statements of the witnesses and experts whom the prosecutor intends to call in the aggravation hearing and the penalty hearing.

IT IS ORDERED that the State provide to the Defendant *all* written or recorded statements of the witnesses and experts whom the prosecutor intends to call regardless of which phase of the trial, including all notes, emails, texts and/or recordings of statements whether to attorneys, support staff, paralegals, investigators, or other personnel at the Maricopa County Attorney's Office or the Mesa Police Department.

If the State believes that the notes, emails, texts and/or recordings of statements (for witnesses intended to be called in the State's case-in-chief only) are not relevant, the State shall provide those notes, emails, texts and/or recordings of statements to the Court for an *in camera* determination as to their relevancy. If the State chooses to turn over all notes, emails, texts and/or recordings of statements regardless of relevancy, the Court will not deem the State to have waived any type of relevancy objection if it is raised at trial.

If the State believes that there are "opinions, theories or conclusions" contained in any of the notes, emails, texts and/or recordings of statements, the State shall provide those notes to the Court for an *in camera* review, highlighting to the Court: (1) exactly what sections it believes are "opinions, theories or conclusions"; and (2) why the Defendant believes that the particularly identified sections are "opinions, theories or conclusions."

If the State has no written or recorded statements to be disclosed other than what has already been disclosed, the State shall file a Notice that it has provided all written or recorded statements of the witnesses and experts whom the prosecutor intends to call regardless of which phase of the trial and that there are no other written or recorded statements to be disclosed.

The Court is mindful that the disclosure and interviews of the witnesses in the penalty phase have not yet been completed.

IT IS ORDERED granting the Defendant's Motion for Discovery Relating to Disclosed State's Witnesses as set forth above. The deadline for the compliance of these orders for the guilt and aggravation phase is **August 19, 2016.** The deadline for the compliance of these orders for the penalty phase is **15 days after the completion of disclosure and witness interviews in the penalty phase.**

Defendant's Motion to Preclude Witnesses

The Court has considered the Defendant's Motion to Preclude Witnesses, the State's Response and the Defendant's Reply. The Court does not need oral argument to decide this issue.

The Defendant requests that the Court preclude the testimony of two guilt phase witnesses who were disclosed by the State on June 20, 2016: MCSO agent Lisa Evans and Sergeant Christopher Withrow. The State asserts that Evans is a foundational witness for the jail telephone call recordings previously disclosed and was also formally disclosed on May 25, 2016. The State further asserts that Withrow is a custodian of records and was referenced within the Mesa Police Reports disclosed to the Defendant on September 6, 2012.

Discovery violations may warrant the imposition of sanctions. Criminal Rule 15.7 authorizes the trial court to sanction a party for discovery violations, including failure to timely disclose evidence. *State v. Payne*, 233 Ariz. 484, 518 ¶ 155, 314 P.3d 1239, 1273 (2013). Any sanction, however, "must be proportional to the violation and must have a 'minimal effect on the evidence and merits.' " *Id.* (quoting *State v. Towery*, 186 Ariz. 168, 186, 920 P.2d 290, 308 (1996)). "[P]reclusion is rarely an appropriate sanction for a discovery violation," *State v. Delgado*, 174 Ariz. 252, 257, 848 P.2d 337, 342 (1993), and should be invoked only when less stringent sanctions would not achieve the ends of justice. *State v. Smith*, 140 Ariz. 355, 359, 681 P.2d 1374, 1378 (1984).

Before imposing sanctions on a party, the court must consider the importance of the evidence to the prosecutor's case, surprise or prejudice to the defendant, prosecutorial bad faith and any other relevant circumstances. *Smith*, 140 Ariz. at 358-59, 681 P.2d 1377-78. Denial of a sanction is generally not an abuse of discretion if the trial court believes the defendant will not be prejudiced. *State v. Fisher*, 141 Ariz. 227, 246, 686 P.2d 750, 769 (1984).

THE COURT FINDS that preclusion of the witnesses is not warranted. Jury selection is set to start on September 7, 2016, with testimony anticipated to begin at the end of September. The Defendant has several weeks before trial to review any related statements, police reports, and to request and conduct interviews of the two witnesses. In fact, as of July 12, 2016, the filing date of the State's Response, the State indicated that it is the process of scheduling interviews for

these two witnesses. The Court does not find that the Defendant will be prejudiced if the Court does not exclude these witnesses. The Court also does not find that the State acted in bad faith or misconduct.

THE COURT FINDS that preclusion would violate *Towery*, since it would be disproportionate to the current violation, the omission can be remedied with pretrial witness interviews, and preclusion would have more than a "minimal effect on the evidence and merits."

IT IS ORDERED denying the Defendant's Motion to Preclude Witnesses.

Defendant's Request to Waive Jury

The Court has considered the Defendant's Request to Waive Jury, the State's Response and Supplemental Response and the Defendant's Reply and Supplemental Reply. The Court does not need oral argument to decide this issue.

The Defendant has offered to waive his right to a jury trial for all three phases of trial. The Defendant requests that the Court and the State consent to his waiver. The State does not consent. The Defendant requests that the Court overrule the State's opposition.

This Court is bound by the law. Arizona Constitution, Article VI, § 17, Arizona Revised Statutes section 13-3983, and Criminal Rule 18.1(b) require the consent of both the prosecution and the court for a defendant to waive his right to a jury trial. The State does not consent.

IT IS ORDERED denying the Defendant's Request to Waive Jury Trial.